

NOTICE OF MODIFICATION OF PROPOSED REGULATIONS

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Subchapter 1. General Civil Service Regulations
Article 21. Layoff and Demotion
and
Title 2. Administration
Division 5. Local Agency Personnel Standards
Chapter 2. Merit Systems Regulations
Article 6. Appointments, Transfers and Nonpunitive
Separations and Demotions
Subarticle 4. Reduction in Force**

DATE: February 11, 2003

TO: ALL STATE AND LOCAL AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET

SUBJECT: Proposed Modification of Amendments to California Code of Regulations,
Title 2 (2CCR) §§ 470, 470.1, 471, and 472; Adoption of 2CCR § 471.1 -
Layoff Rules; and Amendments to Local Agency Personnel Standards
2CCR §§ 17502 and 17520 - Modified Reduction-in-Force Process

Under the authority established in Government Code §§ 18701 and 19801, and pursuant to Government Code § 11346.8(c), the State Personnel Board (SPB) is giving notice of the opportunity to submit comments on modifications that are being considered regarding the above-named regulations.

On January 7, 2003, the five-member State Personnel Board (Board) held a public hearing to consider revisions to the California Code of Regulations. The Board received oral and written comments on the proposed revisions. Part of the regulations have been modified as a result of these comments.

A copy of the full text of the regulations as originally proposed, with the modifications clearly indicated, is attached for your information. The modified regulations will be presented for adoption at the March 4, 2003, meeting of the Board.

SPB's rulemaking file on the proposed action is open to public inspection by appointment Monday through Friday, from 8:00 a.m. to 5:00 p.m., at SPB's Office, 801 Capitol Mall, Room 555, Sacramento, CA 95814.

SPB 1070, State Employee Race/Ethnicity Questionnaire (7/02), and SPB 131A, State Employee Disability Questionnaire Resurvey (6/01), which were proposed for incorporation by reference in their entirety in 2CCR § 471(d)(1), were not altered, and therefore, not included in this notice.

PUBLIC HEARING:

Date and Time: March 4, 2003, from 1:00 p.m. to 1:30 p.m.

Place: Auditorium, Room 150
State Personnel Board
801 Capitol Mall
Sacramento, CA 95814

Purpose: To receive oral public comments about the attached modifications.

WRITTEN PUBLIC COMMENT PERIOD:

The public comment period for written comments will close February 26, 2003, at 5:00 p.m. This is to allow time for SPB staff to provide copies of any written comments to Board members for their consideration at the time of the hearing. Any person may submit written comments about the proposed modification. To be considered by the Board, direct written comments to the attention of Elizabeth Montoya at the State Personnel Board, P.O. Box 944201, MS 55, Sacramento, CA 94244-2010. Written comments may also be e-mailed to Elizabeth Montoya at emontoya@spb.ca.gov or faxed to (916) 653-1280. The backup agency contact person is Steve Unger at the State Personnel Board, (916) 651-8461 or TDD (916) 653-1498. Questions regarding the regulatory process in conjunction with this proposal should be directed to the backup contact person.

Mike Willihnganz
Chief, Policy Division

Attachment: Text of Proposed Regulations with Modifications Clearly Indicated

Text added in the initial notice is indicated by underline. Text deleted in the initial notice is indicated by ~~strikeout~~. Text added subsequently is indicated by bold and double-underline. Text deleted subsequently is indicated by bold and ~~strikeout~~.

Title 2. Administration

Division 1. Administrative Personnel

Chapter 1. State Personnel Board

Subchapter 1. General Civil Service Regulations

Article 21. Layoff and ~~Demotion~~ Review

§ 470. General.

~~In accordance with the provisions of this Article, past hiring practices within the appointing authority where layoff is taking place shall be reviewed to determine if past discrimination has occurred. Where the board finds such discrimination, it shall establish specific orders and subdivisions of layoff and reemployment that result in the relative composition of the affected work force being as nearly as possible the same after the completion of the layoff as it was before the layoff procedures were implemented. A department undergoing layoff shall, prior to implementing a layoff, notify the board's executive officer of the impending layoff so that the executive officer may determine the applicability of Government Code Section 19798. If adjustment of the order of layoff, based on a finding of discrimination, to preserve race/ethnicity and/or gender composition of the workforce is required by federal law, or if failure to adjust the order of layoff for such a reason would result in the federal law or the United States Constitution requires the adjustment of the order of layoff pursuant to Government Code Section 19798, or if the failure to adjust the order of layoff in accordance with Government Code Section 19798 would result in ineligibility for a federal program and a loss of federal~~

funds, a department may not proceed with a seniority-based layoff, but may have to adjust the order of layoff under the circumstances set forth in Section 471.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 19798, Government Code; and Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16.

§ 470.1. Definitions.

For purposes of this Article: in conjunction with the definitions used in Section 547.80, the following definitions shall apply:

(a) "Affected ~~Work Force~~ Workforce" means all employees in the class(es) of layoff.

(b) ~~"Affected Work Force Group" means a group of employees in the class(es) of layoff that meets one of the following definitions.~~ "Census Survey" is the assessment of affected workforce group members by means of analysis of questionnaires, in which the employees self-designate their race/ethnicity, gender, and, if applicable, disability category.

~~(1)—"American Indian" means any person who is a member of an American Indian tribe or band recognized by the Federal Bureau of Indian Affairs; or has at least one-quarter American Indian blood quantum of tribes or bands indigenous to the United States and/or Canada;~~

~~(2)—"Asian" means persons whose origin is the Far East, Southeast Asia or the Indian subcontinent and includes, for example, China, Japan and Korea;~~

~~(3)—"Black" means persons whose origin is any of the Black racial groups of Africa;~~

~~(4)—"Individual with a disability" means, with respect to an individual (1) having a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) having a record of such impairment; or (3) being regarded as having such an impairment;~~

~~(5)—"Female" means all persons of the female gender;~~

~~(6)—"Filipino" means persons whose origin is the Philippine Islands;~~

~~(7)—"Hispanic" means persons whose origin is Mexico, Puerto Rico, Cuba,~~

~~Spain, or the Spanish-speaking countries of Central or South America. It does not include persons of Portuguese or Brazilian origin, or persons who acquired a Spanish surname.~~

~~(8) — "Male" means all persons of the male gender;~~

~~(9) — "Other" means all persons that do not meet the definition for one of the groups defined in (1), (2), (3), (6), (7), (10), or (11);~~

~~(10) — "Pacific Islander" means persons who are defined as such by Government Code Section 11092.5;~~

~~(11) — "White" means persons whose origin is Caucasoid.~~

~~(c) — "Class" means a group of positions as defined in Government Code Section §18523;~~

~~(d)~~(c) "Class(es) of Layoff" means the class(es) designated for a reduction of incumbents through layoff, or demotion in lieu of layoff, under the provisions of Government Code Sections 19997, 19997.8 and 19997.9.

~~(e)~~(d) "Department" means the civil service ~~work force~~ workforce under the appointing power initiating the layoff.

~~(f)~~(e) "Relevant Labor Force" means the pool of ~~qualified applicants for examinations for the class of layoff or the qualified population in the California labor force.~~ individuals who possess the requisite qualifications for the classification or occupational group within the geographic area in which the department can reasonably expect to recruit.

~~(g) — "Work Force Census" means the count of affected work force group members in the class(es) of layoff which is taken by means of a questionnaire filled out by the employees in which each employee identifies which of the groups defined in Section 470.1(b) describes him or her.~~

NOTE: Authority cited: Section 18701 and 19231, Government Code.
Reference: Sections 11092.5, 12940, 19792, 19798, 19997, 19997.2, 19997.8 and 19997.9, Government Code; and Public Health and Welfare Code, Title 42, Chapter 126, Sections 12101-12117 (Americans with Disabilities Act of 1990 [ADA]).

§ 471. Seniority-Based Layoff Impact Determination.

~~(a) — The following procedure shall apply to all layoffs and demotions in lieu of layoff. Prior to the issuance of notices of layoff:~~

~~(1) — the executive officer shall: conduct a census of the employees in the class(es) of layoff. The census shall be taken on a form on which the employee in a class of layoff self-identifies which of the work force groups defined in Section 470.1(b) apply to him/her. Any disagreement between an employee and the employee and the employee's department concerning the employee's self-identification of group membership will be resolved by the executive officer.~~

~~(2) — The executive officer shall authorize the department to conduct a seniority-based layoff of employees in each affected work force group, if after completion of such layoff, the percentage of such group either:~~

~~(A) — would be substantially the same as it was before such layoff; or~~

~~(B) — would be equal to or exceed its percentage in the relevant labor force.~~

~~(3) — If, after the completion of a seniority-based layoff, the percentage of any affected work force group would be less than it was before such layoff and less than the percentage of that work force group in the relevant labor force, the executive officer shall:~~

~~(A) — order the retention of a sufficient number of employees with the highest seniority scores in that work force group in order to maintain its pre-layoff percentage in the of layoff. Such retention shall not alter the order of seniority established for the current layoff, and~~

~~(B) — authorize the department to conduct a seniority-based layoff of all other employees in that work force group, and~~

~~(C) — review the work force census and all other available data, statistical and otherwise, concerning past hiring practices in the department of layoff and if in his or her opinion there is:~~

~~(i) — sufficient relevant evidence, schedule a board hearing for the purpose of determining if past discriminatory hiring practices have occurred in the class(es) of layoff; or~~

~~(ii) — insufficient relevant evidence to schedule such a hearing, authorize the department to lay off those employees who were retained under the provisions of subsection (3)(A).~~

~~(b) — The filing of an appeal of an executive officer decision authorized by subsection (a) pursuant to Section 37 shall not delay implementation of a decision to proceed with a seniority-based layoff.~~

~~(c) — Nothing in this section precludes the board from using any other authorized remedy necessary to carry out the provisions of Government Code Section 19798.~~

(a) A department undergoing layoff shall provide information to the board to allow the board to determine whether the department is **mandated to conduct a seniority-based layoff required by federal law to adjust the order of layoff**, or whether the department is **required by federal law to adjust the order of layoff mandated to conduct a seniority-based layoff, unless a seniority-based layoff would conflict with the provisions of a memorandum of understanding reached pursuant to the Ralph C. Dills Act, Government Code Section 3512 et seq. (Dills Act)**.

(1) The information to be provided to the board may consist of citation **either** to any applicable federal authority that **either** requires the department **, based on a finding of discrimination, to adjust the order of layoff to preserve the pre-layoff race/ethnicity and/or gender composition of the workforce or that provides that the department would be at risk of loss of federal funding for failure to adjust the order of layoff to adjust the order of layoff pursuant to Government Code Section 19798, or to any information that shows that the failure to adjust the order of layoff in accordance with Government Code Section 19798 would result in ineligibility for a federal program and a loss of federal funds.**

(2) If the department is subject to no federal authority that would require it to adjust the order of layoff **, based on a finding of past discrimination pursuant to Government Code Section 19798, and is not aware of any information that shows that the failure to adjust the order of layoff in accordance with**

Government Code Section 19798 would result in ineligibility for a federal program and a loss of federal funds, the department may so state in a declaration submitted to the board, and served upon the respective employee organization whose members may be impacted by the layoff.

(b) If the department determines that it is subject to the provisions of Government Code Section 19798, the department shall provide to the board evidence that it served upon the affected employee(s) and respective employee organization(s) notice of the department's determination under subsection 471(a)(1).

(c) If the executive officer determines that the department has demonstrated that it is not required by any federal authority to adjust the order of layoff, the layoff review process shall end and the executive officer shall authorize the department to proceed with a seniority-based layoff of employees in the class(es) of layoff, unless a seniority-based layoff would conflict with the provisions of a memorandum of understanding reached pursuant to the Dills Act.

(d) If the executive officer determines pursuant to subsection 471(a)(1) that the department is required by federal law to adjust the order of layoff and that an adjustment of the order of layoff may be necessary, the department shall provide the following information to the board:

(1) Results of a departmental census survey of all employees in the class(es) of layoff, using SPB 1070, State Employee Race/Ethnicity Questionnaire (7/02), and SPB 131A, State Employee Disability Questionnaire Resurvey (6/01), which are hereby incorporated by reference in their entirety;

(2) Listing of the affected workforce incumbents in seniority order; and

(3) Any additional supporting information.

(e) Using the information provided by the department pursuant to subsections 471(d)(1), (2), and (3), the executive officer shall conduct a data analysis of the composition of the affected labor force by comparing the most relevant labor force representation with the current representation and post-layoff representation. If the analysis establishes that the labor force representation in the affected workforce would be either substantially the same as it was before

such layoff, or equal to its relevant labor force percentage, the executive officer may authorize the department to proceed with a seniority-based layoff of employees in the class(es) of layoff.

(f) If the analysis conducted in subsection 471(e) establishes that the labor force representation after layoff will not be substantially the same as it was before layoff, the executive officer shall conduct an analysis of any evidence of the existence of discrimination in past hiring practices. This analysis shall include, but is not limited to, a review of job-related hiring and recruiting practices, bottom-line hiring and examination data, discrimination or merit issue complaints and appeals, or any other relevant and factual information. If this analysis establishes the possibility of past discriminatory hiring practices in the class(es) of layoff, the executive officer shall schedule a hearing as provided in Section 472.

(g) At any time during the board's review process, the executive officer may authorize a seniority-based layoff of part of the affected workforce in order to retain a sufficient number of employees with the highest seniority scores in the class(es) of layoff so as to maintain pre-layoff representation. Such retention shall not alter the order of seniority established for the current layoff.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 18654.5, 19790 and 19798, Government Code; and
Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16.

§ 471.1. Appeals.

All appeals submitted under this section shall be in writing and filed no later than 30 days from the date the affected employee, respective employee organization, or department was notified pursuant to Section 471 by the department or the executive officer. Any factual assertions in support of the appeal shall be supported by documentary evidence and/or declarations under penalty of perjury.

(a) Appeal(s) as to the results of the departmental census survey and race/ethnicity, gender, or disability identification of the employee, and appeals as to whether the department is or is not mandated by federal law to adjust the order of layoff or would be at risk of losing federal funding if it does not adjust the order of layoff, shall be filed with the executive officer for resolution. The appeal(s) shall, at a minimum, set forth the legal and factual basis for the appeal(s). The executive officer shall investigate and may request additional information from the filing party and/or the department. If the appellant or the department disagrees with the decision of the executive officer, the appellant or the department may appeal that decision to the board, **no later than 30 days from the date of notification by the executive officer**. The board may rule on the appeal with or without a hearing.

(b) Appeal(s) as to the determination by the executive officer to allow the department to proceed with a seniority-based or seniority-based layoff of part of the affected workforce shall be filed with the Appeals Division of the State Personnel Board for resolution. The appeal(s) shall, at a minimum, set forth the legal and factual arguments as to why the determination(s) challenged in the appeal is/are improper. The Appeals Division shall be authorized to investigate and may conduct a hearing.

(c) The filing of an appeal pursuant to Section 37 shall not delay the implementation of a decision to proceed with a seniority-based layoff.

NOTE: Authority cited: Section 18701, Government Code.

Reference: Section 19798, Government Code; and *Connerly v. State Personnel Bd.* (2001) 92 Cal. App. 4th 16.

§ 472. Past Hiring Practices Hearing.

~~The following procedures shall apply to all layoffs and demotions in lieu of layoff:~~

~~(a) When required by Section 471 or ordered pursuant to Section 471.1, the~~

board shall conduct a hearing to determine if past discriminatory hiring practices have occurred in the class(es) of layoff.

~~(b)~~(a) The executive officer shall give the department and employees in the affected ~~work force~~ workforce at least 15 days notice of the hearing and shall prepare a written report for the hearing. The report shall include all available data, statistical and otherwise, concerning past hiring practices related to the class(es) of layoff.

~~(e)~~(b) Any other party may also present evidence at the hearing concerning past hiring practices related to the class(es) of layoff.

~~(d)~~(c) If the board finds that past discriminatory hiring practices related to the class(es) of layoff have occurred, it shall:

(1) Issue Findings of Fact supporting its determination; and

~~(2)~~—Issue an order to remedy such discrimination. To the extent permitted by law, such an order may include, but is not limited to, changing the order and/or subdivision(s) of layoff and reemployment so that the relative composition of the affected workforce of that category of employees discriminated against will be, as nearly as possible, the same immediately after the layoff as it was immediately before the layoff for those affected work force workforce groups.

~~(e)~~(2) If the board finds ~~that discriminatory~~ no discrimination in past hiring practices ~~have not~~ has occurred, it shall issue an order requiring the layoff to continue in the normal order of seniority, **unless a seniority-based layoff would conflict with the provisions of a memorandum of understanding reached pursuant to the Dills Act.**

NOTE: Authority cited: Sections 18701 and 19702.1, Government Code.
Reference: Sections 19790 and 19798, Government Code; and *Connerly v. State Personnel Bd.* (2001) 92 Cal. App. 4th 16.

Text added in the initial notice is indicated by underline. Text deleted in the initial notice is indicated by strikeout. Text added subsequently is indicated by bold and double-underline. Text deleted subsequently is indicated by bold and strikeout.

Title 2. Administration

Division 5. Local Agency Personnel Standards

Chapter 2. Merit System Regulations

Article 6. Appointments, Transfers and Nonpunitive Separations and Demotions

Subarticle 4. Reduction in Force

§ 17502. Reduction in Force.

(a) Whenever it is necessary because of lack of funds or whenever it is otherwise in the best interests of the appointing authority to reduce staff, the appointing authority may lay off employees including those who have been granted an approved leave of absence. The order in which employees would be separated or demoted in a reduction in force shall be based upon type of appointment, seniority and to the extent practical, relative efficiency. If a performance reporting system is used to determine relative efficiency, it must meet the requirements of Section 17495.

(b) When a layoff is imminent in a local agency, the State Personnel Board Executive Officer may prohibit appointments, except from reemployment lists, to classes of potential layoff, lower level classes in the same series, and classes to which transfer under Section 17500 or 17515 could be made.

~~(c) If adjustment of the order of layoff, based on a finding of discrimination, to preserve race/ethnicity and/or gender composition of the workforce is required by federal law, or if failure to adjust the order of layoff for such a reason would result in the~~ **federal law or the United States Constitution requires the adjustment of the order of layoff pursuant to Government Code Section 19798, or if the failure**

to adjust the order of layoff in accordance with Government Code Section 19798 would result in ineligibility for a federal program and a loss of federal funds, a local agency may not proceed with a seniority-based layoff, but may have to adjust the order of layoff in accordance with Section 17520.

NOTE: Authority cited: Section 19803, Government Code.

Reference: Section 19800, 19798, Government Code; and Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16.

§ 17520. Modified Reduction-in-Force Process.

(a) If a local agency, ~~based upon a finding of past discriminatory hiring practices,~~ is required by federal law or the United States Constitution to adjust the order of layoff pursuant to Government Code Section 19798, or if the failure to adjust the order of layoff in accordance with Government Code Section 19798 would result in ineligibility for a federal program and a loss of federal funds, ~~to preserve the pre-layoff race/ethnicity and/or gender composition of the workforce, or may lose federal funding for failure to adjust the order of layoff based upon such a finding,~~ the local agency shall be subject to the provisions of Government Code Section 19798 and regulations of the State Personnel Board governing the adjustment of layoff pursuant to that statute.

(b) Where the State Personnel Board, after a hearing, finds that ~~discrimination or other illegal practice has~~ past discriminatory hiring practices have occurred in the ~~employment practices of~~ a covered local agency department, that is subject to the provisions of Government Code Section 19798, the State Personnel Board may authorize modification of the layoff, demotion, or reemployment process of the departments under Interagency Merit System jurisdiction to remedy the effects of the discriminatory ~~or illegal hiring practices.~~

Note: Authority cited: Section 19803, Government Code.

Reference: Section 19800, 19798, Government Code; and Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16.